



**STATE OF HAWAII
STATE PROCUREMENT OFFICE**

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**TESTIMONY
OF
AARON S. FUJIOKA
ADMINISTRATOR
STATE PROCUREMENT OFFICE**

**TO THE
HOUSE COMMITTEE
ON
FINANCE**

April 3, 2012

3:00 P.M.

SB 2457, SD2, HD1

RELATING TO PROCUREMENT.

Chair Oshiro, Vice-Chair Lee and committee members, thank you for the opportunity to testify on SB 2457, SD2, HD1.

The SPO opposes SECTIONS 2, 3 and 4 proposing a temporary exemption, limited to certain construction and design-build procurements, to allow the Governor or Mayors to determine applicability of exempting the requirements of the Code.

The Code was established to separate and remove the Governor and Mayors from any procurement decisions by placing the authority, responsibility and accountability with the designated chief procurement officers for the various state and county jurisdictions. This was done to assure the public and all interested parties that the awarding of government contracts is void of any perceived partisan involvement. To allow the Governor and Mayors to exempt procurement requirements may be viewed as a legal maneuver to circumvent the Code.

This section would adversely impact vendors, contractors and service providers by eliminating due process to protest the outcome of award which may be due to faulty specifications and other requirements that may be biased, restrictive or preferential in nature. Protests also allow mistakes on the part of the governmental agency to be corrected.

The bill eliminates checks and balances, limits the ability of the chief procurement officers to take corrective action, and likely lead to misuse.

The SPO opposes SECTION 5 amending section 103D-701 referencing new section 103D-A.

The SPO supports SECTION 8 to make permanent the small purchases limits for goods and services to less than \$100,000 and less than \$250,000 for construction, as enacted in Act 175, SLH 2009 temporarily amending HRS section 103D-305. Act 175 also amends HRS section 103D-305(c) for procurements \$25,000 to less than \$100,000 to be conducted on an electronic procurement system.

The electronic procurement system is the fairest, most efficient, time saving method of procuring small purchases. Electronic procurement ensures the greatest amount of competition by electronically notifying all prospective bidders, in an open and transparent environment.

The SPO supports this section; however, recommends additional amendments to HRS §103D-305. The attached amendments to §103D-305 with reference to section 103D-324 on performance and payment bonds, clarifies procurement officer responsibility, clarifies applicability of electronic procurement includes up to \$250,000 and deletes unnecessary language as electronic procurement (eProcurement) systems are in place, including applicable training.

The SPO opposes SECTION 2, 3, 4 and 5, and supports the attached amended language as a replacement for SECTION 8. Thank you.

ATTACHMENT

§103D-305 Small purchases; prohibition against parceling. ~~*Repeal and reenactment on July 1, 2012. L 2010, c 107, §1.*~~ (a) Procurements of less than \$100,000 for goods or services, or \$250,000 for construction shall be made in accordance with procedures set forth in rules adopted by the policy board that are designed to ensure administrative simplicity and as much competition as is practicable; provided that multiple expenditures shall not be created at the inception of a transaction or project so as to evade the requirements of this chapter; and provided further that procurement requirements shall not be artificially divided or parceled so as to constitute a small purchase under this section.

(b) Procurements ~~[of]~~ greater than \$50,000 for construction under subsection (a) shall require security by ~~[a] performance [bond]~~ and payment bonds, pursuant to section 103D-324, delivered to the ~~[purchasing agency]~~ procurement officer, that is:

- (1) In a form prescribed by the rules of the policy board;
- (2) Executed by a surety company authorized to do business in this State; and
- (3) In an amount equal to one hundred per cent of the price specified in the contract,
or shall otherwise be secured by a performance bond in a manner satisfactory to the
~~[purchasing agency]~~ procurement officer.

(c) Procurements of \$25,000 to less than ~~[\$100,000]~~ \$250,000 shall be made in accordance with small purchase procedures; provided that such small purchase procurements through an electronic system shall be required ~~[after the policy board has adopted rules for electronic procurement and provided training to the affected agency]~~.



NEIL ABERCROMBIE
GOVERNOR

BRIAN SCHATZ
LT. GOVERNOR

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KEALI'I S. LOPEZ
DIRECTOR

TO THE HOUSE COMMITTEE ON FINANCE
TWENTY-SIXTH LEGISLATURE
REGULAR SESSION OF 2012

Date: Tuesday, April 3, 2012
Time: 3:00 p.m.
Conference Room: 308

**TESTIMONY FOR HEARING ON SB 2457, SD2, HD 1
RELATING TO PROCUREMENT**

TO THE HONORABLE MARCUS R. OSHIRO, CHAIR, AND THE HONORABLE
MARILYN B. LEE, VICE-CHAIR, AND MEMBERS OF THE COMMITTEE

The Office of Administrative Hearings ("OAH") of the Department of Commerce and Consumer Affairs ("DCCA") appreciates the opportunity to offer comments for the Committee's Hearing on SB 2457, SD 2, HD 1, relating to Procurement. My name is David Karlen, and I am the Senior Hearings Officer of the OAH.

1. OAH urges this committee to consider the proposed H.D.1 to H.B. 1671.

SB 2457, SD2, HD 1, is intended to simplify and expedite the procurement appeals process by, among other things, limiting the scope of the hearings officer's review to evidence and issues raised in the proceedings before the procuring agency.

This committee previously heard a similar measure, H.B 1671, and passed out a House Draft 2 with changes to House Draft 1 that OAH strongly opposed. Ultimately the House Committee on Finance passed out a draft very similar to S.B. 2457, S.D.2, HD 1. In comparing the various forms of both bills, OAH strongly prefers proposed House Draft 1 of House Bill 1671 to S.B. 2457, S.D.2, HD 1, and urges this committee to favorably consider the language of House Draft 1 in lieu of the current language of this bill. A copy of the House Draft 1 is attached for the Committee's consideration.

Regarding the specific provisions in S.B. 2457 SD 2, HD 1, that are of concern to OAH:

Section 5: The Department supports timely processing of procurement protests including the placement of reasonable time limits on the completion of agency review. The Department does not support the language on page 6 line 21 through page 7 line 2 to the extent it creates a record of protest that would supplant de novo review or otherwise limit the scope of review.

Section 6. This section revises Haw. Rev. Stat. Section 103D-709. This is the section of the procurement code that sets forth the standards of review in a procurement matter. Unlike House Draft 1 of House Bill 1671, S.B. 2457 SD2 HD 1, creates two different procurement tracks. The first "track" would maintain the status quo for reviews under section 103D-106, 103D-310 and 103D-702. The second "track" creates a new procurement review process for protests under 103D-701. This two-track process is problematic because it will add confusion, complexity and delay to a time-

sensitive process, and because the new procurement review process would preclude the hearings officer from conducting *de novo* reviews.

OAH is particularly concerned about the language on pages 12 and 13 of the bill that unnecessarily limits the record reviewed by the hearings officer and requires a ruling no later than thirty days from the filing of the application for review instead of 45 days after the receipt of the request.

2. The Existing De Novo Review Process Should Not Be Changed - De Novo Review Enhances the Integrity of the Procurement Process and Public Confidence in that Process

Hawaii's Procurement Code was based on the American Bar Association's Model Procurement Code for State and Local Governments. The 1993 Procurement Code established that procurement protests would be decided on a *de novo* basis. The most recent version of the American Bar Association's Model Procurement Code was published in 2000 and retains *de novo* review. This Model Procurement Code establishes the standard for "best practices."

De novo review means, in essence, that the hearings officer's decision is based on the matters originally presented by the protester to the agency, without being subject to the decision of the agency official who made the initial evaluation of the protest. It enhances public confidence in the procurement system by eliminating any perception that an agency official with a presumably vested interest in upholding the decisions of his or her agency as to the choice of contractors does not have an inordinate influence on the protest. **It does not mean new issues can be raised before the OAH.** The

law has always been, as stated in many OAH decisions that are publicly available online, that only issues previously raised in the initial protest to the agency can later be raised before the OAH.

SB 2457, SD2, HD 1, mandates an unworkable procedure that will lead to substantial delays at the agency level before a procurement protest is ever filed with OAH and inadequate time to review an agency decision.

The bill requires the procuring agency to prepare "a record of the protest proceedings" but there will be no confidence that such an in-house review creates an accountable, transparent procurement process free of bias or undue favoritism. Also, if the agency's record includes interviews and witness statements, some agencies are not equipped to take and preserve oral testimony as well as to prepare a comprehensive procurement investigative report.

To make matters worse, the current proposed legislation imposes an absolute time limit of thirty (30) days on the OAH. Yet it gives the agency ten (10) days to file the administrative record, with no stated penalties for noncompliance. It is thus in the agency's interest to be late and use up the full ten days, or even more, because failure to conclude the entire OAH proceeding in thirty days automatically means the agency's decision is upheld.

In the remaining twenty days, even assuming the agency timely files the record, the OAH hearings officer is supposed to receive briefs, hear oral argument, take new evidence where appropriate, and issue a written decision that explains the basis for a decision no matter which party prevails. This is totally unrealistic if the case is at all

complicated and will lead to further erosion in public confidence in the viability of the procurement protest process.

3. Revival of Act 175 is a Positive Step to Streamline Procurement

Protests

The latter portion of SB 2457, SD 2, HD 1, starting at page 14, is strongly supported by OAH. It should be improved by adding a 45 day time limit as was contained in Act 175. Act 175 responsibly streamlined the procurement protest process that proved to be workable in practice from July of 2009 to June of 2011. Its revival creates minimum threshold amounts for protests in order to discourage minor complaints. It also requires protestors to file a bond, thus eliminating protests meant merely to delay matters without any hope of success. Revival of Act 175 was proposed by the State Procurement Office (SPO). The SPO surveyed a large group of stakeholders involved in procurement and circulated two drafts before making its final proposal through the original version of HB 1671. The OAH was consulted during this process and supported the SPO's comprehensive efforts that culminated in HB 1671. The draft was further refined in the form of the proposed HB 1671, HD1, that is attached.

OAH strongly urges this committee to favorably consider the attached draft in lieu of the bill in its current form.

Thank you for the opportunity for OAH to provide its comments on this proposed legislation.

HOUSE OF REPRESENTATIVES
TWENTY-SIXTH LEGISLATURE, 2012
STATE OF HAWAII

H.B. NO. 1671
H.D. 1

A BILL FOR AN ACT

RELATING TO PROCUREMENT.

BE IT ENACTED BY THE LEGISLATURE OF THE STATE OF HAWAII:

SECTION 1. Chapter 103D, Hawaii Revised Statutes, is amended by adding a new section to be appropriately designated and to read as follows:

"§103D- Procurement statistics. The state procurement office shall keep statistics on solicitations and awards protested under section 103D-701 for the purpose of improving procurement procedures. The statistics shall include information on protests involving inadvertent errors and amounts forfeited from procurement protests."

SECTION 2. Section 103D-709, Hawaii Revised Statutes, is amended to read as follows:

"§103D-709 Administrative proceedings for review. (a) The several hearings officers appointed by the director of the department of commerce and consumer affairs pursuant to section 26-9(f) shall have jurisdiction to review and determine de novo, any request from any bidder, offeror, contractor, or person aggrieved under section 103D-106, or governmental body aggrieved by a determination of the chief procurement officer, head of a purchasing agency, or a designee of either officer under section 103D-310, 103D-701, or 103D-702.

(b) Hearings to review and determine any request made pursuant

to subsection (a) shall commence within twenty-one calendar days of receipt of the request. The hearings officers shall have power to issue subpoenas, administer oaths, hear testimony, find facts, make conclusions of law, and issue a written decision which shall be final and conclusive unless a person or governmental body adversely affected by the decision commences an appeal in the circuit court of the circuit where the case or controversy arises under section 103D-710. Hearings officers shall issue written decisions not later than forty-five days from the receipt of the request under subsection (a).

(c) Only parties to the protest made and decided pursuant to sections 103D-701, 103D-709(a), 103D-310(b), and [†]103D-702(g) [†] may initiate a proceeding under this section. The party initiating the proceeding shall have the burden of proof, including the burden of producing evidence as well as the burden of persuasion. The degree or quantum of proof shall be a preponderance of the evidence. All parties to the proceeding shall be afforded an opportunity to present oral or documentary evidence, conduct cross-examination as may be required, and argument on all issues involved. ~~[The rules of evidence shall apply.]~~ Fact finding under section 91-10 shall apply.

(d) Any bidder, offeror, contractor, or person that is a party to a protest of a solicitation or award of a contract under section 103D-302 or 103D-303 that is decided pursuant to section 103D-701 may initiate a proceeding under this section; provided that:

- (1) For contracts with an estimated value of less than \$1,000,000, the protest shall concern a matter that is greater than \$10,000; and
- (2) For contracts with an estimated value of \$1,000,000 or more, the protest shall concern a matter that is equal to

no less than ten per cent of the estimated value of the contract.

(e) The party initiating a proceeding under subsection (d) shall pay to the department of commerce and consumer affairs a cash or protest bond in the amount of:

- (1) \$1,000 for a contract with an estimated value of less than \$500,000;
- (2) \$2,000 for a contract with an estimated value of at least \$500,000, but less than \$1,000,000; or
- (3) One-half per cent of the estimated value of the contract or not more than \$10,000, whichever is less, if the estimated value of the contract is \$1,000,000 or more.

If the initiating party prevails in the proceeding initiated under subsection (d), the cash or protest bond shall be returned to that party. If the initiating party does not prevail in the proceeding initiated under subsection (d), the cash or protest bond shall be deposited into the general fund.

~~[(d)]~~ (f) The hearings officers shall ensure that a record of each proceeding which includes the following is compiled:

- (1) All pleadings, motions, intermediate rulings;
- (2) Evidence received or considered, including oral testimony, exhibits, and a statement of matters officially noticed;
- (3) Offers of proof and rulings thereon;
- (4) Proposed findings of fact;
- (5) A recording of the proceeding which may be transcribed if judicial review of the written decision is sought under section 103D-710.

~~[(e)]~~ (g) No action shall be taken on a solicitation or an award of a contract while a proceeding is pending, if the procurement

was previously stayed under section 103D-701(f).

~~[(f)]~~ (h) The hearings officer shall decide whether the determinations of the chief procurement officer or the chief procurement officer's designee were in accordance with the Constitution, statutes, rules, and the terms and conditions of the solicitation or contract, and shall order such relief as may be appropriate in accordance with this chapter.

~~[(g)]~~ (i) The policy board shall adopt such other rules as may be necessary to ensure that the proceedings conducted pursuant to this section afford all parties an opportunity to be heard.

(j) As used in this section, "estimated value of the contract" or "estimated value", with respect to a contract, means either the amount of the lowest responsible and responsive bid under section 103D-302 or the bid amount of the responsible offeror whose proposal is determined in writing to be the most advantageous under section 103D-303, as applicable."

SECTION 3. Section 103D-710, Hawaii Revised Statutes, is amended as follows:

1. By amending subsection (c) to read:

"(c) Within ~~[twenty]~~ ten calendar days of the filing of an application for judicial review, the hearings officer shall transmit the record of the administrative proceedings to the circuit court of the circuit where the case or controversy arises."

2. By amending subsection (e) to read:

"(e) ~~[Upon]~~ No later than thirty days from the filing of the application for judicial review, based upon review of the record the circuit court may affirm the decision of the hearings officer issued pursuant to section 103D-709 or remand the case with instructions for

further proceedings; or it may reverse or modify the decision and order if substantial rights may have been prejudiced because the administrative findings, conclusions, decisions, or orders are:

- (1) In violation of constitutional or statutory provisions;
 - (2) In excess of the statutory authority or jurisdiction of the chief procurement officer or head of the purchasing agency;
 - (3) Made upon unlawful procedure;
 - (4) Affected by other error of law;
 - (5) Clearly erroneous in view of the reliable, probative, and substantial evidence on the whole record; or
 - (6) Arbitrary, or capricious, or characterized by abuse of discretion or clearly unwarranted exercise of discretion
- [~~7~~];

provided that if an application for judicial review is not resolved on or before the thirtieth day from the filing of the application, the circuit court shall lose jurisdiction and the decision of the hearings officer shall not be disturbed. All time limitations on actions, as provided for in section 103D-712, shall remain in effect."

SECTION 4. This Act does not affect rights and duties that matured, penalties that were incurred, and proceedings that were begun, before its effective date.

SECTION 5. Statutory material to be repealed is bracketed and stricken. New statutory material is underscored.

SECTION 6. This Act shall take effect on July 1, 2112.

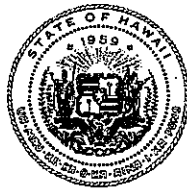
Report Title:

Procurement Code; Protest; Administrative Proceedings

Description:

Imposes time limits on rendering administrative and judicial review decisions; limits protests to those that are a minimum percentage of the contract value; requires posting of a protest bond, to be forfeited if the protesting party does not prevail. Effective July 1, 2112. (HB1671 HD1)

The summary description of legislation appearing on this page is for informational purposes only and is not legislation or evidence of legislative intent.



STATE OF HAWAII
DEPARTMENT OF TRANSPORTATION
869 PUNCHBOWL STREET
HONOLULU, HAWAII 96813-5097

GLENN M. OKIMOTO
DIRECTOR

Deputy Directors
JADE T. BUTAY
FORD N. FUCHIGAMI
RANDY GRUNE
JADINE URASAKI

IN REPLY REFER TO:

April 3, 2012

TESTIMONY OF THE DEPARTMENT OF TRANSPORTATION

SENATE BILL NO. 2457, SD 2, HD1

RELATING TO PROCUREMENT

COMMITTEE ON FINANCE

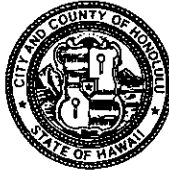
The Department of Transportation (DOT) is testifying only on section 103D-709, Administrative proceedings for review, section (d) and (e) of S.B. No. 2457, S.D. 2, H.D. 1. We defer comment on other sections of the bill to the responsible agencies.

Protests under the procurement code have had a negative impact on the economy because the awarding of construction and design-build projects resulted in costly delays in the commencement and completion of projects. Protests have hindered the procurement process and slowed the normal course of progress of projects that would energize and rejuvenate the economy. This bill requires the party filing for an administrative hearing to post a cash or protest bond. This will discourage parties from filing for an administrative hearing with less than convincing evidence, thus minimizing unnecessary halts to the contract process. Therefore, this bill will ensure contracts to be executed in a timely manner.

Thank you for the opportunity to provide testimony.

DEPARTMENT OF BUDGET AND FISCAL SERVICES
CITY AND COUNTY OF HONOLULU
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PETER B. CARLISLE
MAYOR



MICHAEL R. HANSEN
DIRECTOR

NELSON H. KOYANAGI, JR.
DEPUTY DIRECTOR

COMMENTS OF MICHAEL R. HANSEN, DIRECTOR
DEPARTMENT OF BUDGET AND FISCAL SERVICES
CITY AND COUNTY OF HONOLULU

Rep. Marcus R. Oshiro, Chair,
Rep. Marilyn B. Lee, Vice Chair,
and Members of Committee on
Finance
House of Representatives
The Twenty-Sixth State Legislature
State Capitol
Honolulu, Hawaii 96813

Dear Chair Oshiro, Vice Chair Lee and Members:

Subject: FIN Committee – April 3, 2012 at 3:00 p.m. HST
Senate Bill No. 2457 SD2, HD1 - Relating to Procurement

Thank you for the opportunity to provide comments on S.B. No. 2457 SD2, HD1.
The City requests the following amendments to the bill:

Amend SECTION 5 subparagraph (c) from twenty business days to thirty business days. Thirty business days will allow the protested government agency to conduct a comprehensive review of the protest. Depending on the protest, this review could include investigating numerous issues, consulting with legal counsel, consulting with other parties, receiving determinations from licensing agencies and receiving determinations from federal agencies. A twenty business day deadline may lead to increased requests for DCCA appeals because the government agency's initial review and the resulting determination were rushed to meet that fore mentioned deadline.

Amend SECTION 6 subparagraph (d) to provide clarification on the definition of "estimated damage." The bill's current language is unclear on how "estimated damage" is to be calculated and may cause additional delays as the issue is argued during the DCCA appeal process.

Amend SECTION 6 subparagraph (e) to cover situations where the protesting party does not prevail and the protest is regarding a county's solicitation. Amend the bill to state when the protest is regarding a county solicitation, the protest bond will be divided between the DCCA and the affected county agency. This amendment will allow the counties to be reimbursed for the resources and time expensed in defending against the protest. Currently, the City receives no relief since the protest bond is deposited into the general fund of the State of Hawaii.

The City's proposed amendments to S.B. No. 2457 SD2, HD1 are attached and are in red font.

SECTION 5

(c) If the protest is not resolved by mutual agreement, the chief procurement officer or a designee shall [~~promptly~~] issue a decision in writing to uphold or deny the protest[~~-~~] no later than thirty business days after receipt of the protest. The decision shall:

SECTION 6

(d) Any bidder, offeror, contractor, or person that is a party to a protest of a solicitation or award of a contract under section 103D-302 or 103D-303 that is decided pursuant to section 103D-701 may initiate a proceeding under subsection (c); provided that:

(1) For contracts with an estimated value of less than \$1,000,000, the protest shall concern a matter with estimated damage greater than \$10,000; and

(2) For contracts with an estimated value of \$1,000,000 or more, the protest shall concern a matter with estimated damage that is equal to no less than ten per cent of the estimated value of the contract.

(3) For the purpose of this section, "estimated damage" means the difference between the protestor's bid amount and the amount of the apparent low responsible and responsive bid under section 103D-302 or the bid amount of the responsible offeror whose proposal is determined in writing to be the most advantageous under section 103D-303, as applicable.

(e) The party initiating a proceeding under subsection (d) shall pay to the department of commerce and consumer affairs a cash or protest bond in the amount of:

(1) \$1,000 for a contract with an estimated value of less than \$500,000;

(2) \$2,000 for a contract with an estimated value of at least \$500,000, but less than \$1,000,000; or

(3) One-half per cent of the estimated value of the contract or not more than \$10,000, whichever is less, if the estimated value of the contract is \$1,000,000 or more.

If the initiating party prevails in the proceeding initiated under subsection (d), the cash or protest bond shall be returned to that party. If the initiating party does not prevail in the proceeding initiated under subsection (d), the cash or protest bond shall be deposited into the general fund. In the case of a county issued procurement, 50% of the protest bond shall be deposited into the general fund of the department of commerce and consumer affairs and the remaining 50% shall be deposited into the general fund of the affected county agency.

BIA-HAWAII

BUILDING INDUSTRY ASSOCIATION

Testimony to House Committee on Finance

Tuesday, April 3, 2012

3:00 p.m.

Capitol Room 312

RE: S.B. 2457 SD2 HD1, Relating to Procurement

Dear Chair Oshiro, Vice-Chair M. Lee, and members of the Committee:

My name is Gladys Marrone, Government Relations Director for the Building Industry Association of Hawaii (BIA-Hawaii). Chartered in 1955, BIA-Hawaii is a professional trade organization affiliated with the National Association of Home Builders, representing the building industry and its associates. BIA-Hawaii takes a leadership role in unifying and promoting the interests of the industry to enhance the quality of life for the people of Hawaii.

BIA-Hawaii **strongly supports** S.B. 2457 SD2 HD1, relating to procurement, which proposes to impose time limits on administrative and judicial review decisions; limits protests to those that are a minimum percentage of the contract value; temporarily authorizes the governor or a county mayor to exempt a procurement from protest; and makes permanent the amendments made to section 103D-305, Hawaii Revised Statutes that increase the limits on procurements qualifying for certain small purchase procedures.

S.B. 2457 SD2 revives elements of Act 175 (2009) that were intended to expedite the procurement process for construction projects funded by the American Reinvestment and Recovery Act, but sunset on July 1, 2011. In addition, the bill greatly simplifies the current bid protest appeal process. It eliminates the extensive *de novo* review done currently for bid protest appeals heard by hearings officers from the Department of Commerce and Consumer Affairs (DCCA) Office of Administrative Hearings (OAH). In its place is a process that limits the OAH review to the evidence and issues raised in the proceedings before the procuring agency and the record of procuring agency's decision on a bid protest.

The intent of the bill is to discourage *de minimus* and frivolous bid protests and simplify and expedite the procurement appeal process. The bill recognizes the procuring agency's experience and expertise in the procurement process, while preserving the limited right of review of a procuring agency's decision to the DCCA OAH.

BIA-Hawaii **strongly supports** S.B. 2457 SD2 HD1.

Thank you for the opportunity to share with you our views.

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GCA of Hawaii

GENERAL CONTRACTORS ASSOCIATION OF HAWAII

Quality People. Quality Projects.

Uploaded via Capitol Website

April 3, 2012

TO: HONORABLE REPRESENTATIVES MARCUS OSHIRO, CHAIR, MARILYN LEE,
VICE CHAIR AND MEMBERS OF THE HOUSE COMMITTEE ON FINANCE

SUBJECT: **SUPPORT OF S.B. 2457, SD2, HD1 & PROPOSED AMENDMENTS. RELATING TO PROCUREMENT.** Imposes time limits on administrative and judicial review decisions. Limits protests to those that are a minimum percentage of the contract value. Temporarily authorizes the governor or a county mayor to exempt a procurement from protest. Makes permanent the amendments made to section 103D-305, Hawaii Revised Statutes that increase the limits on procurements qualifying for certain small purchase procedures. Effective July 1, 2112. (SB2457 HD1)

HEARING

DATE: Tuesday, April 3, 2012
TIME: 3:00 p.m.
PLACE: Conference Room 308

Dear Chair Oshiro, Vice Chair M. Lee and Members of the Committee:

The General Contractors Association (GCA) is an organization comprised of over six hundred (600) general contractors, subcontractors, and construction related firms. The GCA was established in 1932 and is celebrating its 80th anniversary this year; GCA remains the largest construction association in the State of Hawaii whose mission is to represent its members in all matters related to the construction industry, while improving the quality of construction and protecting the public interest. **GCA is submitting testimony in support of S.B. 2457, HD1, Relating to Procurement and would like to offer amendments.**

GCA respectfully recommends that the sunset dates only apply to Section 2, regarding the Governor and Mayor's ability to temporarily exempt certain construction and design-build procurements from protest. The remaining sections should remain permanent for reasons articulated below.

GCA also requests that the following be deleted on page 2, Lines 16-21 for reasons articulated below:

~~(B) After award of the contract, information designated as trade secrets or other proprietary data may be disclosed if required by the state attorney general or county corporation counsel, as applicable, in accordance with rules of the state procurement office; and~~

S.B. 2457, SD2, HD1, among other things, revives Act 175 (2009), which was originally passed to strategically implement projects that were funded by the American Reinvestment and Recovery Act. Section 2 incorporates similar language from H.B. 2122, HD2, SD1 relating to temporarily authorizing the governor or a county mayor to exempt a procurement for a construction or design-build contract from protest under 103D-701 and administrative review of a non responsible offeror determination. The bill also proposes to simplify and expedite the procurement appeal process by recognizing the procuring agency's experience and expertise in the procurement process. Section 6 amends Section 103D-709, Hawaii Revised Statutes and preserves the right of review of a procuring agency's decision to the Department of Commerce and Consumer Affairs (DCCA) Office of Administrative Hearings (OAH), while amending an officer's standard of review in a bid protest under section 103D-701, HRS, by removing *de novo* review.

In Section 2, in regards to the temporary authorization by the Governor or County Mayor exempting bid protests is of particular concern in Section 2 and GCA would like to propose striking the following:

~~(B) After award of the contract, information designated as trade secrets or other proprietary data may be disclosed if required by the state attorney general or county corporation counsel, as applicable, in accordance with rules of the state procurement office; and~~

Striking such language will ensure that no confidential or proprietary information is released or breached by unintended parties. GCA remains concerned about the limited release of such trade secrets or other proprietary information because of the possibility of a breach in information. For example, Design-Build proposals may contain proprietary design information that competitors may use to their advantage.

Overall, GCA believes this bill will address concerns with the bid protests which remain problematic and have stalled the startup and completion of public works projects meant to help stimulate the economy. This bill will benefit the procurement process and will make the process more efficient. This session the legislature introduced a number of measures to increase funding for construction projects to aid in the recovery of Hawaii's economy; however these projects will need efficient and timely procurement approvals. All in all, this bill will protect the procurement process; curb problematic decisions by the OAH; and most importantly save tax dollars.

The GCA is proposing the abovementioned amendments and **strongly supports** the passage of S.B. 2457, SD2, HD1 and respectfully recommends that the committee adopt GCA's recommended amendments.

Thank you for the opportunity to provide our views on this measure.



Testimony of Maurice Morita
Assistant Director
Hawaii LECET
1617 Palama Street
Honolulu, HI 96817

HOUSE COMMITTEE ON FINANCE
Tuesday, April 3, 2012
3:00 p.m., Conference Room 308

SB 2457, SD2, HD1 - RELATING TO PROCUREMENT

Aloha Chair Oshiro, Vice Chair Lee, and Members of the Committee:

My name is Maurice Morita and I am the assistant director of Hawaii LECET (Laborers-Employers Cooperation and Education Trust). Hawaii LECET is a partnership between the Hawaii Laborers' Union, Local 368 and our union contractors.

The Hawaii LECET **strongly supports** SB 2457, SD2, HD1, which imposes time limits on rendering administrative and judicial review decisions, limits protests to those that are a minimum percentage of the contract value and requires posting of a protest bond, to be forfeited if the protesting party does not prevail and we **strongly support SB 2457, HD1.**

We would like to recommend that the sunset date do not interfere with the intent of the original SB 2457.

Thank you for the opportunity to submit this testimony.



S & M SAKAMOTO, INC.
GENERAL CONTRACTORS

Via E-mail: FINTestimony@capitol.hawaii.gov
Facsimile: (808) 586-6001

April 3, 2012

TO: HONORABLE REPRESENTATIVES MARCUS OSHIRO, CHAIR, MARILYN LEE, VICE CHAIR AND MEMBERS OF THE HOUSE COMMITTEE ON FINANCE

SUBJECT: **SUPPORT OF S.B. 2457, SD2, HD1 & PROPOSED AMENDMENTS. RELATING TO PROCUREMENT.** Imposes time limits on administrative and judicial review decisions. Limits protests to those that are a minimum percentage of the contract value. Temporarily authorizes the governor or a county mayor to exempt a procurement from protest. Makes permanent the amendments made to section 103D-305, Hawaii Revised Statutes that increase the limits on procurements qualifying for certain small purchase procedures. Effective July 1, 2112. (SB2457 HD1)

HEARING

DATE: Tuesday, April 3, 2012
TIME: 3:00 p.m.
PLACE: Conference Room 308

Dear Chair Oshiro, Vice Chair M. Lee and Members of the Committee:

S&M Sakamoto, Inc. strongly supports S.B 2457, SD2, HD1 Relating to Procurement, but requests the following two amendments.

- (1) Apply sunset dates to Section 2 only; regarding the Governor and Mayor's ability to temporarily exempt certain construction and design-build procurements from protest. The remaining sections should not include a sunset date and should remain permanent for reasons articulated below.
- (2) Delete the following paragraph on page 2, Lines 16-21 to ensure no trade secrets or proprietary information in design-build projects are released:

~~(B) After award of the contract, information designated as trade secrets or other proprietary data may be disclosed if required by the state attorney general or county corporation counsel, as applicable, in accordance with rules of the state procurement office; and~~

Among other things, S.B. 2457, SD2, HD1 revives elements of Act 175 (2009) that were intended to expedite the procurement process for construction projects funded by the American Reinvestment and Recovery Act, but sunset on July 1, 2011. In addition, the bill greatly simplifies the current bid protest appeal process. It eliminates the extensive *de novo* review done currently for bid protest appeals heard by hearings officers from the Department of Commerce and Consumer Affairs (DCCA) Office of Administrative Hearings (OAH). In its place,

is a process that limits the OAH review to the evidence and issues raised in the proceedings before the procuring agency and the record of procuring agency's decision on a bid protest.

The intent of the bill is to discourage *de minimus* and frivolous bid protests and simplify and expedite the procurement appeal process. The bill recognizes the procuring agency's experience and expertise in the procurement process, while preserving the limited right of review of a procuring agency's decision to the DCCA OAH.

For the above mentioned reasons, S&M Sakamoto, Inc. is in **strong support** of S.B. 2457, SD2, HD1 and respectfully requests this Committee to pass this measure with above requested amendments.

Thank you for the opportunity to provide our views on this measure.



Via E-mail: FINTestimony@capitol.hawaii.gov
Facsimile: (808) 586-6001

April 3, 2012

TO: HONORABLE REPRESENTATIVES MARCUS OSHIRO, CHAIR, MARILYN LEE, VICE CHAIR AND MEMBERS OF THE HOUSE COMMITTEE ON FINANCE

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HEARING

DATE: Tuesday, April 3, 2012
TIME: 3:00 p.m.
PLACE: Conference Room 308

Dear Chair Oshiro, Vice Chair M. Lee and Members of the Committee:

LYZ, Inc. **strongly supports** S.B 2457, SD2, HD1 Relating to Procurement, but requests the following two amendments.

- (1) Apply sunset dates to Section 2 only; regarding the Governor and Mayor's ability to temporarily exempt certain construction and design-build procurements from protest. The remaining sections should not include a sunset date and should remain permanent for reasons articulated below.
- (2) Delete the following paragraph on page 2, Lines 16-21 to ensure no trade secrets or proprietary information in design-build projects are released:

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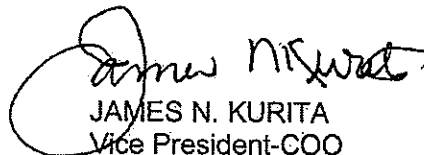
is a process that limits the OAH review to the evidence and issues raised in the proceedings before the procuring agency and the record of procuring agency's decision on a bid protest.

The intent of the bill is to discourage *de minimus* and frivolous bid protests and simplify and expedite the procurement appeal process. The bill recognizes the procuring agency's experience and expertise in the procurement process, while preserving the limited right of review of a procuring agency's decision to the DCCA OAH.

For the above mentioned reasons, LYZ, Inc. is in strong support of S.B. 2457, SD2, HD1 and respectfully requests this Committee to pass this measure with above requested amendments.

Thank you for the opportunity to provide our views on this measure.

Sincerely,



JAMES N. KURITA
Vice President-COO



A Minority Woman Owned & Operated Small Business

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April 2, 2012

TO: HONORABLE REPRESENTATIVES MARCUS OSHIRO, CHAIR, MARILYN LEE, VICE CHAIR AND MEMBERS OF THE HOUSE COMMITTEE ON FINANCE

SUBJECT: SUPPORT OF S.B. 2457, SD2, HD1 & PROPOSED AMENDMENTS. RELATING TO PROCUREMENT. Imposes time limits on administrative and judicial review decisions. Limits protests to those that are a minimum percentage of the contract value. Temporarily authorizes the governor or a county mayor to exempt a procurement from protest. Makes permanent the amendments made to section 103D-305, Hawaii Revised Statutes that increase the limits on procurements qualifying for certain small purchase procedures. Effective July 1, 2112. (SB2457 HD1)

HEARING

DATE: Tuesday, April 3, 2012
TIME: 3:00 p.m.
PLACE: Conference Room 308

Dear Chair Oshiro, Vice Chair M. Lee and Members of the Committee:

Waltz Engineering, Inc. strongly supports S.B 2457, SD2, HD1 Relating to Procurement, but requests the following two amendments.

- (1) Apply sunset dates to Section 2 only; regarding the Governor and Mayor's ability to temporarily exempt certain construction and design-build procurements from protest. The remaining sections should not include a sunset date and should remain permanent for reasons articulated below.
- (2) Delete the following paragraph on page 2, Lines 16-21 to ensure no trade secrets or proprietary information in design-build projects are released:
(B) After award of the contract, information designated as trade secrets or other proprietary data may be disclosed if required by the state attorney general or county corporation counsel, as applicable, in accordance with rules of the state procurement office; and

Among other things, S.B. 2457, SD2, HD1 revives elements of Act 175 (2009) that were intended to expedite the procurement process for construction projects funded by the American Reinvestment and Recovery Act, but sunset on July 1, 2011. In addition, the bill greatly simplifies the current bid protest appeal process. It eliminates the extensive de novo review done currently for bid protest appeals heard by hearings officers from the Department of Commerce and Consumer Affairs (DCCA) Office of Administrative Hearings (OAH). In its place, is a process that limits the OAH review to the evidence and issues raised in the proceedings before the procuring agency and the record of procuring agency's decision on a bid protest.

The intent of the bill is to discourage de minimus and frivolous bid protests and simplify and expedite the procurement appeal process. The bill recognizes the procuring agency's experience and expertise in the procurement process, while preserving the limited right of review of a procuring agency's decision to the DCCA OAH.

For the above mentioned reasons, Waltz Engineering, Inc. is in strong support of S.B. 2457, SD2, HD1 and respectfully requests this Committee to pass this measure with above requested amendments.

Thank you for the opportunity to provide our views on this measure.



RALPH S. INOUE CO LTD
GENERAL CONTRACTOR

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April 3, 2012

TO: HONORABLE REPRESENTATIVES MARCUS OSHIRO, CHAIR, MARILYN LEE, VICE CHAIR AND MEMBERS OF THE HOUSE COMMITTEE ON FINANCE

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Dear Chair Oshiro, Vice Chair M. Lee and Members of the Committee:

My name is Lance Inouye and I am President of Ralph S. Inouye Co., Ltd. (RSI), General Contractor and a member of the General Contractors Association of Hawaii (GCA). RSI **strongly supports** S.B 2457, SD2, HD1 Relating to Procurement, but requests the following two amendments.

- (1) Apply sunset dates to Section 2 only; regarding the Governor and Mayor's ability to temporarily exempt certain construction and design-build procurements from protest. The remaining sections should not include a sunset date and should remain permanent for reasons articulated below.
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The intent of the bill is to discourage *de minimus* and frivolous bid protests and simplify and expedite the procurement appeal process. The bill recognizes the procuring agency's experience and expertise in the procurement process, while preserving the limited right of review of a procuring agency's decision to the DCCA OAH.

For the above mentioned reasons, RSI is in **strong support** of S.B. 2457, SD2, HD1 and respectfully requests this Committee to pass this measure with above requested amendments.

Thank you for the opportunity to provide our views on this measure.